IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

THOMAS MURPHY,	)	
	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 02-453-SLR
	)	
BANCROFT CONSTRUCTION COMPANY,	)	
	)	
	)	
Defendant.	)	

Herbert G. Feuerhake, Esquire, Wilmington, Delaware. Counsel for Plaintiff.

William W. Bowser, Esquire and Adria B. Martinelli, Esquire of Young, Conaway, Stargatt & Taylor, LLP, Wilmington, Delaware. Counsel for Defendant.

MEMORANDUM OPINION

Dated: September 8, 2003
Wilmington, Delaware

ROBINSON, Chief Judge

I. INTRODUCTION

On May 24, 2002, plaintiff Tom Murphy filed suit against defendant and his former employer, Bancroft Construction Company claiming that defendant violated the implied covenant of good faith and fair dealing and that defendant intentionally interfered with plaintiff's prospective employment. (D.I. 1) Plaintiff also claimed that defendant retaliated against him for filing a workers' compensation claim in violation of 19 Del. C. § 2365. Plaintiff further claimed that defendant engaged in racketeering in violation 18 U.S.C. § 1962 ("RICO"). (D.I. 1) This court has jurisdiction over the case at bar based upon 28 U.S.C. §§ 1331, 1332, and 18 U.S.C. § 1964(c).

On November 15, 2002, the court dismissed plaintiff's RICO count pursuant to defendant's motion for judgment. (D.I. 23) Presently, defendant's motion for summary judgment on the three remaining claims is before the court under Fed. R. Civ. P. 56. (D.I. 79) Plaintiff, however, dropped his retaliation claim in his answering brief to defendant's motion. (D.I. 84) The court, therefore, will consider only the remaining two claims in this memorandum order.

II. BACKGROUND

Defendant specializes in "construction management and design build" and has been in operation since 1975. (D.I. 80) Defendant bid against approximately ten contractors to secure work as the Construction Manager at Risk for the renovation of eleven schools in the Capital School District (the "District"). This project was to be completed with funds generated through the passage of a $62 million referendum. (D.I. 1 at ¶5)

Defendant hired plaintiff as a construction manager in January 2000. (D.I. 1 at ¶4) In November 2000, he was promoted to the position of project manager for the project. (D.I. 81 at A1) In this capacity, he was responsible for coordinating work to be performed on the schools. (D.I. 1 at ¶7) Plaintiff became discontent with his employer during the term of this assignment for several reasons. His relationship with his supervisor was tense. (D.I. 1 at ¶12-14) He believed that he was the victim of age harassment and discrimination. (D.I. 1 at ¶16) He also thought defendant engaged in various forms of wrongful conduct, which he attempted to rectify by confidentially informing the District.[1] (D.I. at ¶16)

[1] Plaintiff alleges that he observed wrongdoing and attempted to alert the board president and the District's attorney. His attempts included: 1) suggesting that the board president "keep asking those questions" regarding construction efforts (D.I. 85 at B140); and 2) communicating overstaffing, overcharges, and the incompetencies of defendant's personnel to the District's attorney. (D.I. 85 at B227-30) Plaintiff

Being dissatisfied, plaintiff explored the possibility of employment directly with the District as a construction project field supervisor for the project in the fall of 2001. (D.I. 1 at ¶17 and D.I. 81 at A2-6, 12, 14) In particular, he approached the board of education president with the idea. (D.I. 85 at B140-41) The board president agreed to raise the possibility with the full board. On a separate occasion, the superintendent spoke with plaintiff to inquire about the expected salary for a construction project field supervisor position. (D.I.85 at B194-95) The superintendent, however, did not consent to hire plaintiff during that conversation.

Defendant's president learned of plaintiff's interest in leaving the company and met with him on October 30, 2001 to secure his continued employment. (D.I. 1 at ¶18) Defendant's president offered plaintiff a $10,000 payment to remain until May 2002 when the majority of the project was slated for completion. Defendant considered this payment to be an incentive bonus to ensure the success of the project. (D.I. 81 at A10-11) In contrast, plaintiff characterized this offer as a bribe to secure

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requested that these communications not be shared with defendant because plaintiff feared being fired by defendant. (D.I. 85 at B227) Additionally, plaintiff stated in his complaint that he 1) told defendant's president that defendant should be honest with the District; 2) voiced oral complaints to defendant's managerial staff; and 3) wrote in a 2001 employee survey that "I feel this project [with the District] represents all things 'not' to do in our industry." (D.I. 1 at ¶23)

his silence regarding questionable conduct and declined it on November 1, 2001. (D.I. 81 at A13)

On November 5, 2001, plaintiff suffered a "situational reaction" and removed himself from the workplace. (D.I. 81 at A34) Initially, plaintiff's doctor indicated to defendant that plaintiff would be able to return to work on November 19, 2001. (D.I. 85 at B318) Shortly thereafter, however, plaintiff's doctor clarified to defendant that plaintiff was being treated for depression, anxiety, and situational reaction and that his return to work was indeterminate. (D.I. 85 at B319)

On November 7, 2001, two days after plaintiff's emotional breakdown, defendant's president attended a board meeting. (D.I. 81 at A20) He informed the board that it would not be in the best interest of the project to hire plaintiff. (D.I. at A112-113) Particularly, he indicated that the level of documentation would likely increase if plaintiff were hired. Two months later, in January 2002, the District issued a vacancy announcement for the construction project field supervisor. (D.I. 81 at A42-43) Plaintiff submitted his application for the position two days before the deadline date. (D.I. at A44-48) Plaintiff was not interviewed, and the board unanimously selected another candidate. (D.I. 81 at A83-86) Defendant did not participate in this hiring decision. (D.I. at A122)

On April 4, 2002, plaintiff provided an update from his

doctor to defendant stating that he still was not able to return to work for an indefinite period due to his illness. (D.I. 85 at B320) Defendant consequently sent an official termination letter to plaintiff on April 11, 2002 as a result of both this April 4th communication and plaintiff's five-month absence. (D.I. 85 at B317)

Following his termination, plaintiff initiated an audit with the Office of the Auditor of Accounts for the State of Delaware (the "Auditor") to uncover wrongdoing by defendant.[2] (D.I. 81 at A58-63) The Auditor investigated three of plaintiff's allegations relating to falsified time charges, improper financial records, and improper gifts to District employees including sporting event tickets, dinner cruises, and golf outings. In a report issued October 15, 2001, the Auditor found no support for the first two allegations. He did conclude that District employees attended functions sponsored by defendant in violation of District policy.

[2]Plaintiff claimed that defendant (1) provided the District with improper gratuities and free dinners; (2) engaged in improper billing procedures; (3) provided confidential information to District officials; (4) held secret meetings with District officials to discuss a joint intent to withhold problematic information from the superintendent and board; (5) misused District office space and equipment; (6) falsified time cards; and (7) stole plaintiff's computer to destroy information detrimental to defendant. (D.I. 1)

III. STANDARD OF REVIEW

A court shall grant summary judgment only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the burden of proving that no genuine issue of material fact exists. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 n.10 (1986). "Facts that could alter the outcome are 'material,' and disputes are 'genuine' if evidence exists from which a rational person could conclude that the position of the person with the burden of proof on the disputed issue is correct." Horowitz v. Fed. Kemper Life Assurance Co., 57 F.3d 300, 302 n.1 (3d Cir. 1995) (internal citations omitted).

If the moving party has demonstrated an absence of material fact, the nonmoving party then "must come forward with 'specific facts showing that there is a genuine issue for trial.'" Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e)). The court will "view the underlying facts and all reasonable inferences therefrom in the light most favorable to the party opposing the motion." Pennsylvania Coal Ass'n v. Babbitt, 63 F.3d 231, 236 (3d Cir. 1995). The mere existence of some evidence in support of the nonmoving party, however, will not be

sufficient for denial of a motion for summary judgment; there must be enough evidence to enable a jury reasonably to find for the nonmoving party on that issue. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). If the nonmoving party fails to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof, the moving party is entitled to judgment as a matter of law. See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). In other words, the court must grant summary judgment if the party responding to the motion fails to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof. Omnipoint Comm. Enters., L.P. v. Newtown Township, 219 F.3d 240, 242 (3rd Cir. 2000) (quoting Celotex, 477 U.S. at 323).

IV. DISCUSSION

1. Defendant's Motion for Summary Judgment on Plaintiff's Breach of Implied Covenant of Good Faith and Fair Dealing Claim

Under the common law, the employment-at-will doctrine (the "Doctrine") permits an employer to dismiss an employee at any time without cause and regardless of motive. See Merrill v. Crothall-American, Inc., 606 A.2d 96 (Del. Super. Ct. 1992). Delaware law, however, has evolved from the harshness of the doctrine. It now recognizes a limited implied covenant of good faith and fair dealing exception (the "Covenant") to protect at-will employees from wrongful termination. Id. Nevertheless, the

Delaware Supreme Court has limited application of this exception in at-will employment situations to four narrowly defined categories: (1) where the termination violated public policy; (2) where the employer misrepresented an important fact and the employee relied thereon either to accept a new position or remain in a present one; (3) where the employer used its superior bargaining power to deprive an employee of clearly identifiable compensation related to the employee's past services; and (4) where the employer falsified or manipulated employment records to create fictitious grounds for termination. Lord v. Souder, 748 A.2d 393, 400 (Del. 2000) (citing E.I. Dupont de Nemours and Co. v. Pressman, 679 A.2d 436, 442-44 (Del. Super. Ct. 1996)).

To demonstrate a breach of the covenant under the public policy category, an employee must satisfy a two-part test: (1) the employee must assert a public interest recognized by some legislative, administrative or judicial authority; and (2) the employee must occupy a position with responsibility for advancing or sustaining that particular interest. Lord, 748 A.2d at 401 (citing Pressman, 679 A.2d at 441-42). In emphasizing the requirements of the first prong, the implicated public policy must be clearly mandated for this exception to shield an employee. Pressman, 679 A.2d at 441. Otherwise, the exception would too broadly restrict an employer's freedom to contract. Id. at 442.

Turning to the instant case, defendant argues that plaintiff was neither discharged nor constructively discharged and, thus, cannot invoke a covenant claim. Defendant contends that plaintiff instead abandoned his position for an indefinite duration. In addition, defendant argues that plaintiff was not subject to intolerable working conditions such that he was forced to remove himself from the workplace. Defendant points out that plaintiff was never demoted or given lesser job responsibilities. Rather, defendant offered plaintiff a $10,000 "bonus" to remain an employee.

In the alternative, defendant argues that plaintiff does not fall into one of the four specific categories for application of a covenant claim. Defendant acknowledges that the first category, i.e., where the termination violated public policy, is the only category possibly relevant.[3] Nevertheless, defendant asserts that plaintiff cannot satisfy the two-part test to demonstrate a breach. That is, plaintiff cannot show either a recognized public interest or that he occupied a position with responsibility for that interest.

Defendant contends that plaintiff has not identified any

[3]Plaintiff did not identify with particularity any of the exceptions to employment at will in his complaint. (D.I. 1 at 8) Plaintiff simply claimed the status of a "whistleblower" without citation to any specific statutory provisions. In his answering brief to defendant's summary judgement motion, plaintiff clarified that he indeed sought to avail the public policy exception. (D.I. 84 at 15)

illegal act on defendant's part. Defendant argues that plaintiff is, therefore, not a "whistleblower." Rather, defendant argues that plaintiff, at most, has identified improper internal business practices. Moreover, defendant stresses that plaintiff raised these practices with the auditor after filing his lawsuit, not during the term of his employment. The auditor, in turn, performed a complete investigation and only found a violation of District policy. He did not uncover any illegality.

Furthermore, defendant asserts that plaintiff did not hold a position related to the alleged illegal conduct. As a project manager, he was not involved in the financial procedures, but instead coordinated work to be performed on the schools. Accordingly, defendant argues that plaintiff was just a witness to the conduct.

In response to defendant's argument, plaintiff maintains that he was discharged via an official termination letter. Additionally, plaintiff contends that he was constructively discharged as a result of the $10,000 payment offer and workplace harassment. Plaintiff next asserts that his discharge violated public policy because a public interest exists in protecting school funds from fraudulent misuse. Lastly, plaintiff asserts that he was in a position for this interest given his involvement in staffing decisions and administration of subcontracts.

In considering defendant's motion for summary judgment, the

court must view the underlying facts and all reasonable inferences therefrom in a light favorable to the plaintiff. With this standard in mind, the court presumes that plaintiff was indeed terminated by defendant as plaintiff alleges in light of defendant's April 11, 2002 letter to plaintiff. The court then considers whether defendant has met its burden of proving that no genuine issue of material facts exists as to the breach of covenant claim.

Based upon its review of the pleadings, depositions, appendices to parties briefs, and affidavits of record, the court agrees with defendant that plaintiff has failed to implicate a public interest. Although plaintiff posits that protecting school funds from fraudulent misuse constitutes such interest, the auditor did not identify any illegal conduct on defendant's part. Plaintiff has only uncovered a violation of District policy with the evidence presented to the court. As one treatise states: "Employees who uncover and blow the whistle on questionable internal financial and business practices [absent illegality] have won no support from the courts." Holloway & Leech, Employment Termination: Rights and Remedies 180 (2d ed. 1993) (citing cases). Plaintiff's mere allegations devoid of any concrete evidence is an insufficient showing. Since the first prong of the two-part test required to avail the public policy exception is not met, the court need not consider whether

plaintiff was in a position of responsibility for the public interest. Hence, the court finds that defendant has satisfied its burden and grants defendant's motion for summary judgment as to the breach of covenant claim.

2. Defendant's Motion for Summary Judgment on Plaintiff's Intentional Interference with Business Relationship Claim

To establish a claim for intentional interference with a prospective business relationship, plaintiff must show: (1) the reasonable probability of a business opportunity; (2) the intentional interference by defendant with that opportunity; (3) proximate causation; and (d) damages. DeBonaventura v. Nationwide Mut. Ins. Co., 428 A.2d 1151, 1153 (Del. Super. Ct. 1981) (citations omitted). These elements must be considered "in light of a defendant's privilege to compete or protect his business interests in a fair and lawful manner." Id. Nevertheless, the Restatement (Second) of Torts § 767 recognizes that there are certain circumstances in which an individual is privileged to interfere with a contract. In determining whether an actor's conduct in intentionally interfering is improper, a court may evaluate the following factors: (1) the nature of the actor's conduct; (2) the actor's motive; (3) the interest of the other with which the actor's conduct interferes; (4) the interests sought to be advanced by the actor; (5) the social interests in protecting the freedom of action of the actor and

the contractual interests of the other; (6) the proximity or remoteness of the actor's conduct to the interference; and (7) the relations between the parties. See Gillenardo v. Connor Broadcasting Del. Co., 1999 Del. Super. LEXIS 530, *24 (Del. Super. Oct. 27, 1999)(citing Restatement (Second) of Torts § 767).

Defendant argues that plaintiff cannot establish any of the elements necessary for his claim. First, defendant points out that plaintiff simply began discussions with the District and that he was not given a promise of employment. Second, defendant maintains that it was privileged to protect its business and that its single statement to the board regarding the best interests of the project was not inherently wrongful or independently tortious behavior. Rather, defendant argues that its statement was no more than an opinion. Moreover, defendant contends that it made the statement with the intent to protect its contract for the project, not out of vindictiveness toward plaintiff. Finally, it is defendant's position that plaintiff was not damaged by the alleged interference because he suffered a "situational reaction" and removed himself from the workplace prior to defendant's comments to the board.

In response, plaintiff argues that his business opportunity was virtually unquestionable because a board member testified in deposition that plaintiff would be a good candidate.

Q: You believed it was a good idea to hire Mr. Murphy, but you were unable to get a consensus of the board.
A: I don't recall saying hiring, but I remember saying something in that effect about getting a consensus on the board.
Q: Who believed that Mr. Murphy would be a good candidate for the position and who disagreed?
A: At that time I believe it was myself, Mr. Adams. I can't recall anybody else off the top of my head.
Q: Yourself and Mr. Adams thought that Murphy would be good for the position.
A: At that time.

(D.I. 85 at B140-41)

Additionally, plaintiff submits that defendant intentionally threatened the board by using the terms "irreparable" or "irrevocable" to ensure plaintiff would not be hired.

A: At some point Steve Mockbee came and addressed our board.
Q: Was that in executive session?
A: In executive session, yes. Essentially, that he thought that we were considering hiring Tom, and essentially said, if you do this, you hire this disgruntled employee – and I'm paraphrasing. I'm thinking back - if you hire this disgruntled employee, it will cause damage to our relationship, irreparable, irrevocable damage to the relationship that the district has with Bancroft.
Q: You said you're paraphrasing. Did he use the word "irreparable"?
A: No. He did use the word "disgruntled."

(D.I. 85 at B182) Moreover, plaintiff argues that defendant's motivation in making this threat was to prevent plaintiff from disrupting its ability to drain every drop of money out of the project, not to alert the board to a potential problem in the relationship.

The court agrees with defendant that plaintiff cannot

establish a claim for intentional interference with a prospective business relationship as a matter of law. The court does not find that plaintiff enjoyed a reasonable probability of employment with the District. Plaintiff has shown only that two board members found him to be a good candidate; he did not establish anything concerning the positions of the remaining board members. As well, plaintiff did not participate in the interview process or hold an offer for employment in hand. He merely shared informal conversations with the board president and the superintendent. Further, at the time of these conversations, the District did not have an open requisition for a construction project field supervisor.

Even if the court accepted plaintiff's argument that a reasonable probability of a business opportunity existed, the court rules that plaintiff's interference claim fails for a second reason. The court finds that plaintiff has not established that defendant intentionally interfered with that opportunity. The court does not deem defendant's conduct in making the one statement of record to be either threatening or motivated by ill will toward plaintiff. To the contrary, defendant appeared to act out of a privileged, legitimate business interest. It properly sought to maintain its contract with the District on a large, complex, ongoing project. Because plaintiff cannot sufficiently establish either the first or

second elements of a claim for intentional interference with prospective business relationship, defendant's motion for summary judgment is granted as to this claim.

V. CONCLUSION

For the reasons stated above, the court grants defendant's motion for summary judgment as to both the implied covenant of good faith and fair dealing and the intentional interference with prospective business relationship claims.[4] The court will issue an order to this effect in conjunction with this opinion.

[4]Given the court's ruling regarding defendant's motion for summary judgment, defendant's motion to strike plaintiff's claim of a breach of an implied covenant of good faith and fair dealing is moot. (D.I. 86) Defendant's alternative motion to strike pages 3 through 12 of plaintiff's answering brief to defendant's motion for summary judgment as immaterial, irrelevant, and impertinent is likewise moot. (D.I. 86)

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BANCROFT CONSTRUCTION COMPANY,	)	
	)	
	)	
Defendant.	)	

O R D E R

At Wilmington this 8th day of September, 2003, having reviewed papers submitted in connection therewith, for the reasons stated;

IT IS ORDERED that:

1. Defendant's motion for summary judgment (D.I. 79) is granted with respect to claim one of plaintiff's complaint (D.I. 1).

2. Defendant's motion for summary judgment (D.I. 79) is granted with respect to claim two of plaintiff's complaint (D.I. 1).

3. The Clerk of Court is directed to enter judgment in favor of defendant and against plaintiff.

Sue L. Robinson
United States District Judge